No. 17-965

IN THE

Supreme Court of the United States

DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES, *et al.*,
Petitioners,

v.

STATE OF HAWAII, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMERICAN JEWISH COMMITTEE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS AND AFFIRMANCE

MARC D. STERN
AMERICAN JEWISH COMMITTEE
165 East 56th St
New York, NY 10022
(212) 891-1480

Counsel for Amicus Curiae American Jewish Committee

ADAM S. LURIE
Counsel of Record
VIJAYA R. PALANISWAMY
CAITLIN K. POTRATZ
JOHN W. AKIN
STEPHEN A. COBB
LINKLATERS LLP
601 13th St NW, Ste 400 South
Washington, D.C. 20005
(202) 654-9200
adam.lurie@linklaters.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 5

I. THE WELL-DOCUMENTED HISTORY OF § 1152(A)(1)(A) DEMONSTRATES THAT THE PROCLAMATION IS UNLAWFUL 5

A. Section 1152(a)(1)(A) Bars the President from Using His Power Under § 1182(f) to Discriminate Based on Nationality 5

B. The History of U.S. Immigration Law Shows that § 1152(a)(1)(A) Is a Carveout to § 1182(f) 8

II. UNLIKE THE PROCLAMATION, PRIOR U.S. IMMIGRATION POLICIES SHOW LEGITIMATE REASONS FOR GIVING PREFERENCE TO CERTAIN GROUPS. 17

III. JUDICIAL REVIEW RESPECTS OUR CONSTITUTIONAL STRUCTURE AND LIMITS ON PRESIDENTIAL POWER 22

CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

CASES:

Clinton v. *City of New York*, 524 U.S. 417 (1998) 23

FDA v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000) 6

Sale v. *Haitian Centers Council, Inc.*, 509 U.S. 155 (1993) 20

Shamsian v. *Ilchert*, 534 F. Supp. 178 (N.D. Cal. 1982) 21

United States v. *SCRAP*, 412 U.S. 669 (1973) 23

United States v. *Tod*, 290 F. 198 (2d Cir. 1923) (per curiam) 12

Whitman v. *American Trucking Associations*, 531 U.S. 457 (2001) 6, 7

Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579 (1952) 22

Zivotofsky ex rel. Zivotofsky v. *Clinton*, 566 U.S. 189 (2012) 23

STATUTES:

8 U.S.C. § 1152(a)(1)(A) ..... *passim*

8 U.S.C. § 1182(f) ..... *passim*

Act of Feb. 5, 1917, ch. 29, 39 Stat. 874 10

Act of May 19, 1921, ch. 8, 42 Stat. 5 12

Act of Oct. 3, 1965, Pub. L. 89-236, 79 Stat. 911 15

Act of Sept. 21, 1961, Pub. L. 87-256, 75 Stat. 527 15

TABLE OF AUTHORITIES—Continued

Page(s)

McCarran-Walter Immigration and Nationality Act of 1952, Pub. L. 82-414, § 212(e), 66 Stat. 163 15

EXECUTIVE ORDERS, DETERMINATIONS, AND PROCLAMATIONS:

Executive Order No. 12,206, 45 Fed. Reg. 24,101 (Apr. 7, 1980) 21

Executive Order No. 12,711, 55 Fed. Reg. 13,897 (Apr. 11, 1990) 19-20

Executive Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017) 5, 12, 14

Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017) 5, 12, 14

Presidential Determination No. 80-11, 45 Fed. Reg. 8539 (Jan. 28, 1980) 19

Presidential Determination No. 99-23, 64 Fed. Reg. 28,085 (May 18, 1999) 19

Presidential Determination No. 2016-13, 81 Fed. Reg. 70,315 (Sept. 28, 2016) 19

Proclamation No. 5517, 51 Fed. Reg. 30,470 (Aug. 22, 1986) 21

Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 27, 2017) ..... *passim*

LEGISLATIVE MATERIALS:

61 Cong. Rec. 1438 (1921) 11, 12

65 Cong. Rec. 5868 (1924) 13

H.R. Rep. No. 68-350 (1924) 13

H.R. Rep. No. 82-1365 (1952) 14

TABLE OF AUTHORITIES—Continued

Page(s)

H.R. Rep. No. 89-745 (1965) 7

Immigration: Hearing on S. 500 Before the Subcomm. on Immigration and Naturalization of the S. Comm. on the Judiciary, 89th Cong. 239 (1965) 16

S. 1919, 86th Cong. (1959) 16

S. Rep. No. 89-748 (1965) 7, 16

Staff of Comm. on Immigration, 61st Cong., *Reports of the Immigration Commission* (Comm. Print 1910) 9, 10

OTHER AUTHORITIES:

Press Release, AJC, *AJC Mourns Passing of Senator Lautenberg* (June 3, 2013) 20

Naomi W. Cohen, *Not Free to Desist: The American Jewish Committee 1906-1966* (1972) 9, 11, 12, 14

Gardiner Harris, David E. Sanger & David M. Herszenhorn, *Obama Increases Number of Syrian Refugees for U.S. Resettlement to 10,000*, N.Y. Times (Sept. 10, 2015) 19

Dr. Martin Luther King, Jr., Address to the American Jewish Committee (May 20, 1965) 3, 10

Doriane Lambelet Coleman, *Individualizing Justice Through Multiculturalism: The Liberals' Dilemma*, 96 Colum. L. Rev. 1093 (1996) 14-15

TABLE OF AUTHORITIES—Continued

Page(s)

Letter from Milton E. Krents to Alfred E. Bernheim (Mar. 5, 1956) 16

Sherally Munshi, *Race, Geography, and Mobility*, 30 Geo. Immigr. L.J. 245 (2016) 12

Mae M. Ngai, *The Architecture of Race in American Immigration Law: A Reexamination of the Immigration Act of 1924*, 88 J. Am. Hist. 67 (1999) 13

Margaret Sands Orchowski, *The Law that Changed the Face of America: The Immigration and Nationality Act of 1965* (2015) 16

Marianne R. Sanua, *Let Us Prove Strong: The American Jewish Committee 1945-2006* (2007) 14, 15

Adam Taylor, *That Time the United States Happily Airlifted Thousands of Muslim Refugees Out of Europe*, Wash. Post (Nov. 17, 2015) 19

Patrick Weil, *Races at the Gate: A Century of Racial Distinctions in American Immigration Policy (1865-1965)*, 15 Geo. Immigr. L.J. 625 (2001) 10

IN THE

Supreme Court of the United States

No. 17-965

DONALD J. TRUMP,
PRESIDENT OF THE UNITED STATES, *et al.*,
Petitioners,

v.

STATE OF HAWAII, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMERICAN JEWISH COMMITTEE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS AND AFFIRMANCE

INTEREST OF *AMICUS CURIAE*

American Jewish Committee ("**AJC**") is a non-profit international advocacy organization that was established in 1906 with the purpose of protecting the civil and religious rights of American Jews.[1] It has

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae* or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

approximately 170,000 members and supporters, and maintains 22 regional offices in major cities nationwide. AJC has participated as *Amicus Curiae* in numerous cases throughout the last century in support of its mission.

Throughout history, Jews have been immigrants and refugees seeking asylum from tyranny and oppression. Even in the wake of atrocities such as the Holocaust and Jewish pogroms in Russia, Jews have often faced significant resistance to their resettlement. AJC was founded by American Jews concerned about these very issues. Guided by this painful historical stigma, AJC continues to zealously advocate for an inclusive America that provides a safe haven for refugees fleeing from persecution.

AJC firmly believes that a strong, united America is vital to securing global freedom and security. Consistent with this position, AJC has long promoted fair and just immigration policy. Historically, AJC has lobbied against rigid immigration quotas based on national origin, and has instead emphasized the importance of rules that are sufficiently flexible to accommodate pressing immigration needs.

As discussed further below, AJC has advocated for the careful and considered extension of protection to groups in need, including by welcoming oppressed peoples to the United States. Over the years, AJC has worked with a variety of stakeholders, including leaders of Latino communities, other religious and community leaders, entrepreneurs, and students, to promote comprehensive immigration reform. Further, AJC has consistently challenged ill-conceived actions based on mere prejudice, which are antithetical to the values of both AJC and the United States.

Today, AJC champions the civil rights of all people, and seeks equality, uniformity, and consistency in policies that affect all Americans, without regard to national origin, race, or religion. The rights of Jews and other religious minorities will be secure only when the rights of peoples of all nationalities and faiths are equally secure. In 1965, in a passionate speech before AJC's Annual Meeting in New York, Dr. Martin Luther King, Jr., acknowledged the "fundamental truth" of AJC's founding statement, that "Jews cannot ensure equality for themselves unless it is assured for all."[2] By recognizing our common cause, he explained, we are "honoring the truth that all life is interrelated and all men are interdependent," and "that the agony of the poor diminishes the rich," while "the salvation of the weak enriches the strong." His words continue to ring true today. Accordingly, for these reasons and those that follow, AJC cannot support the Proclamation.[3]

SUMMARY OF THE ARGUMENT

Section 212(f) of the Immigration and Nationality Act ("**INA**"), 8 U.S.C. § 1182(f), provides the President with broad authority to suspend by proclamation the entry of immigrants. That authority, however, is not absolute. In particular, 8 U.S.C. § 1152(a)(1)(A) bars the President from issuing visas in a way that discriminates based on race and nationality, among other grounds. As the Ninth Circuit correctly recognized, § 1152(a)(1)(A) is more specific than and

---

[2] Dr. Martin Luther King, Jr., Address to the American Jewish Committee 1 (May 20, 1965), http://www.thekingcenter.org/archive/document/address-mlk-american-jewish-committee.

[3] Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 27, 2017) (the "**Proclamation**").

was enacted after § 1182(f), and thus the former should be read to qualify the latter. When read together, § 1152(a)(1)(A) is a carveout to § 1182(f).

This reading is bolstered by the history of federal immigration law. In the first half of the twentieth century, a sense of racism and nationalism permeated this Nation's approach to immigration. The immigration acts of 1917, 1921, 1924, and 1952—the last including § 1182(f)—were all rooted in the national origins system, and were enacted with the goal of maintaining an Anglo-Saxon demographic in America. By contrast, the Immigration and Nationality Act of 1965—including § 1152(a)(1)(A)—was enacted at the height of the Civil Rights Era, and was a conscientious effort by Congress to replace the national origins system with an immigration framework built not around race, but around community. Today, § 1182(f) still provides the President with broad authority. But history shows that Congress meant for § 1152(a)(1)(A) to stand as a nondiscrimination limit on this authority.

Past presidential practice also supports this reading. The Executive has wielded its immigration authority many times, but typically to favor certain endangered groups. And even when immigration law has been used to ban certain people from immigrating, the bans were carefully drawn in scope and duration.

Finally, this case is justiciable. At bottom, it is about interpreting the INA, a familiar judicial exercise, and involves plaintiffs who have been directly harmed by the President's unilateral, unlawful action in direct conflict with the INA when properly interpreted. The Ninth Circuit's ruling should therefore be affirmed.

ARGUMENT

I. THE WELL-DOCUMNETED HISTORY OF § 1152(a)(1)(A) DEMONSTRATES THAT THE PROCLAMATION IS UNLAWFUL.

The President may have broad immigration authority under the INA—but the INA also imposes limits. As the Ninth Circuit correctly recognized, the Proclamation, like the executive orders that preceded it,[4] "once again conflicts with the INA's prohibition on nationality-based discrimination in the issuance of immigrant visas." *Hawaii* v. *Trump*, 878 F.3d 662, 673 (9th Cir. 2017) (per curiam). Here, the Government once again advances an incorrect and misguided interpretation of § 1152(A)(1)(A), claiming that this critical safeguard—a hard-fought victory from the Civil Rights Era—simply "operates in a different sphere than Sections 1182(f) and 1185(a)(1)," Pet'rs' Br. 50, and should give way in light of the older, inoperative statutory provisions that reflect the prior racist immigration regime of the first two-thirds of the twentieth century.

A. Section 1152(a)(1)(A) Bars the President from Using His Power Under § 1182(f) to Discriminate Based on Nationality.

Citing 8 U.S.C. § 1182(f), President Trump issued the Proclamation. 82 Fed. Reg. at 45,161. The statute broadly provides:

> Whenever the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the

---

[4] *See* Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017) ("EO-1"); Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017) ("EO-2").

> interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.

The President now relies heavily on this section to defend the Proclamation and his authority to issue it.

But, as Respondents and the Ninth Circuit have pointed out, there are multiple flaws with this reliance. Among them is the existence of 8 U.S.C. § 1152(a)(1)(A). That section broadly provides that, with exceptions not relevant here, "no person shall receive any preference or priority or be discriminated against in the issuance of an immigrant visa because of the person's race, sex, *nationality*, place of birth, or place of residence" (emphasis added).

And not only is § 1152(a)(1)(A) more specific than § 1182(f), but also it was enacted later. It is well established that "the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

It is equally well established that historical context informs statutory meaning. *See e.g.*, *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 471 (2001) (interpreting statute "in its statutory and historical context"). This canon carries extra weight here because of the historical relationship between § 1182(f) and § 1152(a)(1)(A).

Section 1182(f) was enacted as part of an immigration-law overhaul that capped off half a

century of immigration policy premised on racial and nationality-based discrimination.

By contrast, § 1152(a)(1)(A) was enacted as part of another immigration-law overhaul that did not merely tinker with existing law, but consciously and sharply broke with the past. It was passed more or less in tandem with landmark civil rights legislation such as the Civil Rights Act of 1964 and the Voting Rights Act of 1965 to reject the shameful legacies of previous eras, in which immigration policy was premised on a "national origins system" that explicitly sought to maintain a certain "ethnic composition of the American people." H.R. Rep. No. 89-745 (1965); S. Rep. No. 89-748 (1965). With AJC's support, the passage of this law marked a sea change, and was the culmination of a decades-long fight for a more just immigration policy that would reflect the ideals and mores of the United States.

Section 1152(a)(1)(A) represents far more than a restriction on issuing a "travel document," as the Government improbably claims. Pet'rs' Br. 49. The Government's interpretation of § 1152(a)(1)(A) ignores critical historical context and would eviscerate its protections, allowing the President to discriminate on prohibited grounds by simply denying entry, rather than visas, to immigrants deemed "undesirable" on the sole basis of national origin. This Court has long acknowledged that historical context must also inform the meaning and interpretation of a statute. *See, e.g., Whitman*, 531 U.S. at 471.

As the Ninth Circuit observed, "[i]t is difficult to imagine that Congress would have celebrated the passing of the bill as 'one of the most important measures treated by the Senate for its restatement of this country's devotion to equality and freedom'" were

these protections so easily circumvented by simply invoking § 1182(f) to bar immigrants with valid immigration visas from entry. *Hawaii* v. *Trump*, 878 F.3d at 696 (alterations omitted). Instead, as the Ninth Circuit recognized, § 1152(a)(1)(A) acts a nondiscrimination carveout to § 1182(f). *Id.*

Today, § 1182(f) is a broad grant of presidential power, and § 1152(a)(1) acts as a bar against wielding that power in discriminatory ways. The Ninth Circuit correctly reached this conclusion based on the specificity and later enactment of § 1152(a)(1)(A). A closer look at the historical context bolsters this conclusion.

B. The History of U.S. Immigration Law Shows that § 1152(a)(1)(A) Is a Carveout to § 1182(f).

During the first decades of the twentieth century, Congress was taking its first steps toward a comprehensive immigration law. Those steps, however, reflected a nation not yet ready to come to terms with racial and ethnic pluralism. The first comprehensive immigration legislation was spurred by racist and nationalist notions that permeated the country's legal culture. This legislation imposed restrictive and discriminatory immigration policies, including literacy tests and severe national origin quotas. This pattern continued for another 40 years, culminating in the Immigration and Nationality Act of 1952 and bequeathing us what is now § 1182(f).

It took the cultural sea change that was the Civil Rights Era to upend and transform U.S. immigration law. The Immigration and Nationality Act of 1965—written by the author of the Civil Rights Act of 1964 and the Voting Rights Act of 1965, and enacted in a

tidal wave of revolutionary legislation—gave us § 1152(a)(1)(A). This reform repudiated wholesale discriminatory immigration policies motivated by racial and religious animus.

AJC does not deny that § 1182(f) still has a valid purpose. At a minimum, though, history compels that it be read alongside the carveout that is § 1152(a)(1)(A)—drafted more than a decade later against a culturally historic backdrop repudiating the idea of demographic homogeneity as the cornerstone of immigration policy.

1. The Immigration Act of 1917: Literacy Tests

Until the turn of the century, federal immigration was piecemeal and largely restrictive. But "when nativist feeling revived in the decade following 1905, fed largely by the sectional prejudices of the South and the West Coast, restrictionist demands increased, with much accompanying talk by intellectuals of 'superior races,' 'race improvement,' and 'race suicide.'" Naomi W. Cohen, *Not Free to Desist: The American Jewish Committee 1906–1966*, at 39 (1972). As part of the nationalist immigration movement, in 1906, Senator William Dillingham pushed to require literacy tests for immigrants. *Id.* at 40. He referred the matter to a new Joint Immigration Commission, which he chaired. *See id.* The Commission's research concluded that "[t]he proportion of the more serious crimes of homicide, blackmail, and robbery, as well as the least serious offenses, is greater among the foreign-born." Staff of Comm. on Immigration, 61st Cong., 1 *Reports of the Immigration Commission* 33 (Comm. Print 1910) (the "**Commission Reports**").

To keep these "foreign-born" off American soil, the Commission made two recommendations. First, it

recommended that the existing restrictions on Chinese, Japanese, and Korean immigrants continue, and that South Asians also be excluded. *Id.* at 47. Second, it listed literacy tests and quotas as ways to restrict immigration, ultimately recommending the literacy test "as the most feasible single method of restricting undesirable immigration." *Id.* at 48. The Commission also created a "Dictionary of Races or Peoples." 5 Commission Reports.

Following the Commission's recommendation, Congress elected to impose a literacy test to prevent "undesirable" immigration. Over the President's veto, it passed the Immigration Act of 1917.[5] Act of Feb. 5, 1917, ch. 29, 39 Stat. 874. And given the history behind the Act, the literacy test's purpose is not surprising: "The true purpose of the test was to select immigrants on the basis of their 'race,'" as people of different origins had "dramatically different" literacy rates. Patrick Weil, *Races at the Gate: A Century of Racial Distinctions in American Immigration Policy (1865–1965)*, 15 Geo. Immigr. L.J. 625, 635 (2001). With its first comprehensive piece of immigration legislation, Congress reflected the times.

---

[5] AJC has endeavored to stand against these tides from the beginning. In his remarks to AJC in 1965, for example, Dr. King honored the organization by explaining that "as early as 1911, when few men dared to speak out, [AJC] launched a campaign in New York State to end the advertisement of discrimination in public accommodations, in recreational resorts and amusement parks," a campaign that "resulted in the passage in 1913 of a state law which has served as a model for many other states and has thus made possible the extension of dignity for Negroes, Puerto Ricans and other minorities." *Supra* note 2.

2. *The Emergency Immigration Act of 1921: Quotas*

The Literacy Act, however, was only the beginning:

> America repudiated her traditional mission. The exemplar of democracy, the haven of the oppressed, the nation which interlaced diplomacy with humanitarianism turned disillusioned and cynical. The seeming futility of the crusade abroad and the "100-percent Americanism" generated by the war effort created a mood of fervent nationalism which erupted first in the Red scare of 1919–20 and found expression also in a revitalized Ku Klux Klan, the restriction of immigration, and heightened racism.

Cohen, *supra*, at 123. This spirit of "100-percent Americanism" spurred Congress to action. It sought a "temporary restrictive measure," so that it could change the immigration laws "to meet the demands that are so pressing and that the people all over the country desire, to the end that the great number of undesirables * * * should not be permitted to come to this country." 61 Cong. Rec. 1438 (1921) (statement of Rep. Raker). In short order, Congress's guiding principle emerged: "the Members of this body really desire to restrict." *Id.*

The resulting proposed legislation was indeed restrictive—the Senate version even removed a provision giving special treatment to immigrants fleeing religious persecution. *Id.* at 1436. Still, in the eyes of some, the bill had not gone far enough. Senator Johnson remarked that each time a bill went through the legislative process, it became "a little more restrictive, and I am inclined to think that if * * * the

bill is signed and becomes a law, by the time the year is up Congress will then be ready to enact something still more restrictive." *Id.*

The House was gripped by a similar sentiment. Echoing comments that, sadly, have a contemporaneous ring, Congressman John Linthicum declared that "[t]he time is at hand when America must first assimilate those who have already entered our borders, must first find work for those of our own citizenship and see to it that America is first for Americans." *Id.* at 1437. So to ensure an "America for Americans," Congress included in the new law what was lacking from the old: a quota system, based on nationality. *See* Act of May 19, 1921, ch. 8, § 2(a), 42 Stat. 5, 5. The new law thus became known as the Quota Act. *See, e.g.*, *United States* v. *Tod*, 290 F. 198, 199 (2d Cir. 1923) (per curiam). The quota formula "was designed to preserve the racial character of the nation by restricting new migration from southern and eastern Europe," to complement the existing restrictions on Asian immigrants. Sherally Munshi, *Race, Geography, and Mobility*, 30 Geo. Immigr. L.J. 245, 277 (2016). And under the national origins quota system—as with EO-1, EO-2, and the Proclamation—people would arrive in America, only to find out that they could not enter. Cohen, *supra*, at 141-42.

3. The Immigration Act of 1924: Unfiltered Animus

Immigration laws became increasingly restrictive in response to growing nationalist pressures. Even after the 1921 Act was passed, the quota system "allowed far too many immigrants from southeastern Europe to please the advocates of Anglo-Saxon superiority." *Id.* at 139. So as cultural and congressional racism reached a fever pitch,

Congress passed the Immigration Act of 1924. The House Report speaks for itself:

> With full recognition of the material progress which we owe to the races from southern and eastern Europe, we are conscious of the continued arrival of great numbers tends to upset our balance of population, to depress our standard of living, and unduly charge our institutions for the care of the socially inadequate.
>
> * * *
>
> [The quota system] is used in an effort to preserve, as nearly as possible, the racial status quo in the United States. It is hoped to guarantee, as best we can at this late date, racial homogeneity * * * .

H.R. Rep. No. 68-350, pt. 1, at 13-14 (1924).

At the individual level, one Congressman philosophized that "trouble grows out of a country composed of intermingled and mongrelized people. The stability of a country depends upon the homogeneity of population." 65 Cong. Rec. 5868 (1924) (statement of Rep. Hershey). And a Senator exclaimed, "Thank God we have in America perhaps the largest percentage of any country in the world of the pure, unadulterated Anglo-Saxon stock; certainly the greatest of any nation in the Nordic breed." *Id.* at 5961 (statement of Sen. DuRant Smith). Congress thus tightened the quota system, contributing to "the racialization of immigrant groups around notions of whiteness, permanent foreignness, and illegality." Mae M. Ngai, *The Architecture of Race in American Immigration Law: A Reexamination of the Immigration Act of 1924*, 88 J. Am. Hist. 67, 92 (1999).

As Congress did not hide its intentions in passing the Immigration Act of 1924, so the President has not hidden his intentions in enacting EO-1, EO-2, and their direct descendant, the Proclamation.

4. The McCarran-Walter Immigration and Nationality Act of 1952: The End of an Era and Introduction of § 1182(f)

Restrictive immigration law only continued after World War II. "World War II, like World War I, was followed by a Red scare, which again required American democracy to balance national security and civil liberties"—a familiar balancing act today. Cohen, *supra*, at 345. Hence "U.S. immigration and naturalization law, which the AJC had fought so extensively throughout the late 1940s and early 1950s, only became worse with the passage of the McCarran-Walter Immigration and Nationality Act of 1952." Marianne R. Sanua, *Let Us Prove Strong: The American Jewish Committee, 1945–2006*, at 79 (2007).

Rooted once again in notions of Anglo-Saxon superiority, the 1952 Act was more restrictive than anything that had come before. It followed the "national origin formula of the Quota Act of 1924 in allocating quotas among the various independent countries of the world." H.R. Rep. No. 82-1365, at 29 (1952), *as reprinted in* 1952 U.S.C.C.A.N. 1655, 1680. But the 1952 Act went further still.

The 1952 Act erected "even more obstacles in the way of potential immigrants to the United States and included procedures that permitted deportation of aliens without judicial review and a distinction between native-born and naturalized American citizens." Sanua, *supra*, at 79; *see also* Doriane Lambelet Coleman, *Individualizing Justice Through*

Multiculturalism: The Liberals' Dilemma, 96 Colum. L. Rev. 1093, 1120 n.149 (1996) ("The 1952 McCarran-Walter Act preserved this national origins system and guided American immigration policy until 1965."). In fact, hopeful immigrants "had to fill out visa applications specifying their race and ethnic classification, and authorities evaluated them in light of a 'Dictionary of Races or Peoples.'" Sanua, *supra*, at 79. It was this Act—until now, the high-water mark of a nationalistic (and racist) restrictive immigration policy—that created § 1182(f). *See* McCarran-Walter Immigration and Nationality Act of 1952, ch. 477, § 212(e), 66 Stat. 163, 188.[6]

5. The Immigration and Nationality Act of 1965: A New Approach and § 1152(a)(1)(A)

In 1965, however, in the midst of the Civil Rights Era,[7] and with AJC's support, Congress finally and completely rejected the racist national origins quota system by enacting the Immigration and Nationality Act of 1965. Act of Oct. 3, 1965, Pub. L. 89-236, 79 Stat. 911. This palpable shift repudiated years of restrictive immigration policy based on discrimination, intolerance, and fear.

In place of the old nationalistic system, the 1965 Act established a "new system of selection designed to be fair, rational, humane, and in the national interest."

---

[6] Section 212(e) was redesignated § 212(f) in 1961. Act of Sept. 21, 1961, Pub. L. 87-256, § 109(c), 75 Stat. 527, 535.

[7] As the Ninth Circuit noted, "Congress enacted § 1152(a)(1)(A) of the INA contemporaneously with the Civil Rights Act of 1964 and the Voting Rights Act of 1965 to eliminate the 'national origins system as the basis for the selection of immigrants to the United States.'" *Hawaii* v. *Trump*, 878 F.3d at 695.

S. Rep. No. 89-748, at 8 (1965), *as reprinted in* 1965 U.S.C.C.A.N. 3327, 3332.

As part of this newfound fair, rational, and humane system, Congress passed what is now § 1152(a)(1)(A), barring bare discrimination in immigration law. The focus of immigration policy was no longer on demographic stability, but on family relationships with U.S. citizens and lawful residents. *Id.* No longer were people excluded on the basis of race or national origin. Now, all were welcomed to the United States.[8]

---

[8] Behind the scenes, AJC played an integral role in the passage of the 1965 Act. Senator Jacob Javits of New York, a close affiliate of AJC, argued vociferously in its favor. *See* Letter from Milton E. Krents to Alfred E. Bernheim, at 2 (Mar. 5, 1956), www.ajcarchives.org/ajc_data/files/tv22cc.pdf. In fact, Senator Javits had introduced his own immigration reform bill. *See* S. 1919, 86th Cong. (1959). When testifying before the Senate Subcommittee on Immigration and Naturalization, he openly decried the racism of the 1952 Act and urged its repeal. *Immigration: Hearing on S. 500 Before the Subcomm. on Immigration and Naturalization of the S. Comm. on the Judiciary*, 89th Cong. 239 (1965). In place of the 1952 Act, Senator Javits stated that he "would like to see our whole immigration policy revised to proceed on the basis of relationship to citizens and residents of the United States and skill." *Id.* at 240. These principles were successfully inserted into the INA.

AJC also won critical support from key members in the Executive Branch, including Assistant Attorney General Norbert Schlei, author of the Civil Rights Act of 1964 and the Voting Rights Act of 1965; Abba Schwarz, who served as Assistant Secretary of State for Security and Consular Affairs under President Kennedy; and Myer Feldman, personal advisor to Presidents Kennedy and Johnson. *See* Margaret Sands Orchowski, *The Law that Changed the Face of America: The Immigration and Nationality Act of 1965*, at 66 (2015) (describing the trio as "American Jewish Committee lobbyists").

This context is critical. Properly understood, § 1152(a)(1)(A) represented a sea change in the fight between two competing visions for the future of U.S. immigration policy. Racist, restrictive immigration laws like the Proclamation harken back to the era of literacy tests and national origin quotas, all in the name of preserving an Anglo-Saxon demographic. The Ninth Circuit properly read § 1182(f) as granting the President broad powers in immigration narrowed by § 1152(a)(1)(A), at least in regard to classes defined by national origin, as in the Proclamation.

And historically, while § 1182(f) originated out of the old race-based, restrictive immigration regime, § 1152(a)(1)(A) represents the manifestation of congressional intent "to repudiate a history of nationality and race-based discrimination in United States immigration policy." *Hawaii* v. *Trump*, 878 F.3d at 695. Against this historical backdrop, it becomes clear not only *that* § 1152(a)(1)(A) is a nondiscrimination bar on the President's powers under § 1182(f), but also *why* it is a bar.

Finally, it is not necessary to hold that § 1182(f) is entirely overridden by § 1152(a)(1)(A). Classes other than national origin are conceivable—for example, people who persecute their subjects, people committed to violent activity, or even people providing essential services in their home countries. The Ninth Circuit correctly read § 1182 and § 1152(a)(1)(A) together.

II. UNLIKE THE PROCLAMATION, PRIOR U.S. IMMIGRATION POLICIES SHOW LEGITIMATE REASONS FOR GIVING PREFERENCE TO CERTAIN GROUPS.

As the cases above demonstrate, the now-rejected history of U.S. immigration policy is at times rife with

examples of racism, nationalism, and intolerance, of which the Proclamation is only the most recent instance. That is not to say, however, that in no circumstance can immigration policy take cognizance of potential immigrants' national origin. More-recent history shows that U.S. foreign policy, including national security interests, can serve as legitimate justification for shaping U.S. immigration policy. Granting preferential treatment to certain immigrant groups in response to legitimate foreign policy concerns, though, requires issuing carefully tailored policies implemented for legitimate and bona fide reasons and supported by factual evidence.

In stark contrast to the Proclamation, prior U.S. immigration laws and policies have favored extending protections in the United States to specific groups of immigrants and refugees in need. Legitimate and bona fide reasons have supported these preferences. Consistent with the founding principles of human dignity, self-determination, and religious freedom that are central to American democracy, the Executive and Legislative branches have frequently exercised their authority over immigration affairs to protect refugees and other people in urgent need of refuge.

Historically, the United States has welcomed groups of persecuted refugees. In 1979, for example, the United States provided sanctuary to approximately 111,000 Vietnamese refugees escaping economic hardship and the threat of tortuous "re-education" camps following the Vietnam War. The next year, that number almost doubled to 207,000 refugees. Around the same time, during the Mariel boatlift, the United States accepted over 120,000 Cuban refugees who were fleeing persecution by the Castro regime,

including more than 80,000 in one month alone.[9] More recently, in 1999, the United States agreed to accept 20,000 refugees from Kosovo.[10]

The Executive branch has often established rational policies designed to assist groups in need, including through the use of Presidential Determinations on Refugee Admissions, which can increase admissions and funding for refugees in response to humanitarian needs.[11] Yet another example is President George H.W. Bush's Executive Order 12,711, "Policy

---

[9] *See* Gardiner Harris, David E. Sanger & David M. Herszenhorn, *Obama Increases Number of Syrian Refugees for U.S. Resettlement to 10,000*, N.Y. Times (Sept. 10, 2015), www.nytimes.com/2015/09/11/world/middleeast/obama-directs-administration-to-accept-10000-syrian-refugees.html?_r=1.

[10] *See* Adam Taylor, *That Time the United States Happily Airlifted Thousands of Muslim Refugees Out of Europe*, Wash. Post (Nov. 17, 2015), www.washingtonpost.com/news/worldviews/wp/2015/11/17/that-time-the-united-states-happily-airlifted-thousands-of-muslim-refugees-out-of-europe/?utm_term=.7cd5cd88608d.

[11] A Presidential Determination is a formal policy document issued by the White House, stating the position of the Executive branch on a particular issue, such as the adoption of a new foreign policy. *See, e.g.*, Presidential Determination No. 2016-13, 81 Fed. Reg. 70,315 (Sept. 28, 2016) (permitting admission of up to 110,000 refugees to the United States in 2017, allocated on the basis of special humanitarian concern and geographic regions, and specifically providing that individuals in Cuba, Eurasia and the Baltics, Iraq, Honduras, Guatemala, and El Salvador could be considered refugees); Presidential Determination No. 99-23, 64 Fed. Reg. 28,085 (May 18, 1999) (allowing 20,000 Kosovar refugees to be admitted and providing $15 million in funds for relief); Presidential Determination No. 80-11, 45 Fed. Reg. 8539 (Jan. 28, 1980) (determining that Afghan refugees were eligible for assistance, and contributing monetary resources to their relief, in response to "urgent humanitarian needs").

Implementation with Respect to Nationals of the People's Republic of China," which deferred deporting Chinese nationals for four years in response to the Tiananmen Square incident. *See* 55 Fed. Reg. 13,897 (Apr. 11, 1990). In each of these cases, the Executive branch crafted a policy that was specifically tailored to assist a group in need.

Congress, too, has enacted immigration legislation in favor of specific groups to extend the protection of the United States to oppressed communities. The Lautenberg Amendment is one particularly noteworthy example. The Amendment, originally enacted with the 1990 Foreign Appropriations Bill, classified Soviet Jews and certain other religious communities as persecuted groups, automatically qualifying them for refugee status. Senator Lautenberg's initiative facilitated entry into the United States for Soviet refugees just before the collapse of the Soviet Union.[12]

What is more, even when the President has legitimately excluded certain groups, those exclusions pale in comparison to the Proclamation. For example, in *Sale* v. *Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), the Court cited § 1182(f) and refused to strike down President George H.W. Bush's executive order interdicting Haitian immigrants. *Id.* at 187-88. That order, however, was limited in scope—Haitian immigrants—and was sparked by a clearly defined event—a mass exodus of Haitians following a military coup and installment of a brutal dictator. *Id.* at 162.

---

[12] *See* Press Release, AJC, *AJC Mourns Passing of Senator Lautenberg*, (June 3, 2013), www.ajc.org/site/apps/nlnet/content2.aspx?c=7oJILSPwFfJSG&b=8479733&ct=13164165.

Similarly, in 1980, President Carter banned all Iranian immigrants. Exec. Order No. 12,206, 45 Fed. Reg. 24,101 (Apr. 7, 1980); *see Shamsian* v. *Ilchert*, 534 F. Supp. 178, 185 (N.D. Cal. 1982). A federal court upheld the ban, in part because it was targeted retaliation against Iran during the Iranian hostage crisis. *Shamsian*, 534 F. Supp. at 182.

Finally, in 1986, President Reagan banned nearly all Cuban immigrants, citing § 1182(f). Proclamation No. 5517, 51 Fed. Reg. 30,470 (Aug. 22, 1986), *reprinted in* 100 Stat. 4481. But this ban was also discrete retaliation, namely, against Cuba for its suspension of the U.S.-Cuba immigration agreement. *Id.* And even this ban had exceptions. *Id.* § 2. Past immigration bans were thus carefully drawn in scope and duration and served an urgent foreign policy objection. The Proclamation is anything but. We will not burden the Court with the evidence of that animus laid out elsewhere. *See* Resp'ts' Br. 75-76.

Unlike the Proclamation, none of the examples above was motivated by religious discriminatory animus or the mere execution of baseless campaign promises to exclude certain groups of people. Instead, these prior policies were deliberately designed and tailored to achieve particular, justified results, and they demonstrate how the Executive and Legislative branches have rationally used their immigration and foreign affairs authorities to advance the legitimate government purpose of protecting refugees and other oppressed peoples. These examples, which reflect careful consideration of the facts as well as respect for U.S. values and essential human dignity, are precisely the kinds of immigration policies that AJC has championed throughout its history.

Accepting immigrants and refugees in times of need has long been a core tenet of the fundamental values and national identity of the United States. True to its character, this Nation frequently has opened its gates, offering safe haven and freedom for those without. Immigration has proved to confer enormous benefits on U.S. foreign policy, national security, and the economy.

As demonstrated by the immigration policies discussed above, U.S. history is replete with examples of facially legitimate and bona fide reasons for Congress and the President to exercise their immigration powers by discriminating on the basis of religion or ethnicity. Inclusive policies that grant preferential treatment have not only strengthened the Nation and reinforced fundamental values, but also have saved thousands of lives. In contrast to the stark lack of rational support offered here, these historical examples further demonstrate why the Proclamation cannot withstand even minimal scrutiny.

III. JUDICIAL REVIEW RESPECTS OUR CONSTITUTIONAL STRUCTURE AND LIMITS ON PRESIDENTIAL POWER.

Finally, the Government argues that Respondents' statutory claims are nonjusticiable. *See* Pet'rs' Br. 17-30. That is plainly incorrect. This case about Executive power ultimately turns on the proper scope of § 1182(f) and its relationship to § 1152(a)(1)(A). On our reading of these provisions, the President's Proclamation seeks to override binding legislative directives, something he may not do. *Cf. Youngstown Sheet & Tube Co.* v. *Sawyer* (*Steel Seizure Case*), 343 U.S. 579 (1952). This is a form of review which this Court has characterized as a "familiar judicial

exercise." *Zivotofsky ex rel. Zivotofsky* v. *Clinton*, 566 U.S. 189, 196 (2012).

A president cannot unilaterally act in a way that overturns "duly enacted statutes" forged out of the "'finely wrought' procedure that the Framers designed." *Clinton* v. *City of New York*, 524 U.S. 417, 439-40 (1998). Nor can those harmed by such acts be left without recourse. No less than the steel-mill workers in the *Steel Seizure Case*, Petitioners here have "alleged a 'personal stake' in having an actual injury redressed," *id.* at 430, an actual injury caused by the Proclamation's disregard for the INA. The Court has found standing when the alleged injury was far less concrete and clearly connected to Executive action. *See, e.g.*, *United States* v. *SCRAP*, 412 U.S. 669, 678 (1973) (environmental groups could sue to suspend railroad surcharge on basis that increased costs to railroads would discourage their use of recyclable materials and cause groups "economic, recreational and aesthetic harm").

Accordingly, because the questions this case presents are issues of statutory interpretation, and because Petitioners have suffered a concrete harm strongly connected to the Proclamation, the Ninth Circuit correctly held that Respondents' claims are justiciable.

CONCLUSION

While the President enjoys broad authority to set immigration policy, that authority is not unlimited. Here, because the Proclamation conflicts with the INA's prohibition on nationality-based discrimination in the issuance of immigrant visas, it cannot survive even the most basic judicial scrutiny. For these

reasons, and those in Respondents' briefs, the judgment below should thus be affirmed.

Respectfully submitted,

MARC D. STERN
AMERICAN JEWISH COMMITTEE
165 East 56th St
New York, NY 10022
(212) 891-1480

Counsel for Amicus Curiae American Jewish Committee

ADAM S. LURIE
Counsel of Record
VIJAYA R. PALANISWAMY
CAITLIN K. POTRATZ
JOHN W. AKIN
STEPHEN A. COBB
LINKLATERS LLP
601 13th St NW, Ste 400 South
Washington, D.C. 20005
(202) 654-9200
adam.lurie@linklaters.com